IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
November 6, 2009 Session

DOJI, INC. D/B/A DEMOS' STEAK AND SPAGHETTI HOUSE v. JAMES G. NEELEY, COMMISSIONER, TENNESSEE DEPARTMENT OF LABOR & WORKFORCE DEVELOPMENT EMPLOYMENT SECURITY DIVISION AND KENDRA D. CARRENO

Appeal from the Chancery Court for Rutherford County
No. 08-0096CV Robert E. Corlew, III, Chancellor

No. M2009-00970-COA-R3-CV - Filed December 16, 2009

A fired employee filed for unemployment benefits. The former employer opposed the benefits, maintaining that the employee was fired for misconduct. The Department of Labor and Workforce Development initially found for the employee and the employer appealed. After a full hearing, the Appeals Tribunal found for the employee. The employer appealed. The Board of Review affirmed the Appeals Tribunal's decision. The employer appealed. The chancery court affirmed the administrative decision, and the employer appealed. We affirm the chancery court's decision.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed

ANDY D. BENNETT, J., delivered the opinion of the court, in which FRANK G. CLEMENT, JR. and RICHARD H. DINKINS, JJ., joined.

Benjamin Henry Bodzy and M. Kim Vance, Nashville, Tennessee, for the appellant, Doji, Inc. d/b/a Demos' Steak and Spaghetti House.

Robert E. Cooper, Jr., Attorney General and Reporter; Michael E. Moore, Solicitor General; and Warren A. Jasper, Assistant Attorney General; for the appellee, James G. Neeley.

OPINION

BACKGROUND

In early May 2007, Kendra Carreno was fired from her job as an assistant manager for DOJI, Inc., which does business as Demos' Steak House ("Demos'"). She does not challenge her termination. She seeks unemployment benefits. Demos' opposes Carreno's claim for benefits on

the grounds that she was fired for misconduct and, therefore, should not receive unemployment benefits.

Carreno worked for Demos' for about three years. Among her duties was the supervision of servers. A fundamental tenet of Demos' management philosophy is that the managers apply the Four "F's" – firm, fair, friendly and flexible. The record of complaints about Carreno begins in September 2006 when a customer filled out a comment card that said Carreno was loud and rude to staff. On October 13, 2006, Carreno's supervisor, Linda Lemons, counseled her about her attitude and performance. Also in October 2006, the company president, Peter Demos, avoided sending new management trainees to the Nashville restaurant because they would have to train under Carreno. In December 2006, $200 was deducted from Carreno's bonus because of unfriendly staff and management interactions.

For the next several months, there were apparently no major complaints about Carreno. In April 2007, due to her pregnancy with twins, Carreno missed two weeks for bed rest. Upon her return, she told Ms. Lemons that she would have to limit her walking, how much she carried, and, eventually, her hours.

In late April or early May 2007, complaints began again. Three complaints occurring close together were, for Peter Demos, "the last straw." There was an incident with server Phinn Shannon in which Carreno sent him home for smoking outside without permission. Shannon claimed he had permission and subsequently went to Lemons, who had a meeting with both Shannon and Carreno. Shannon also complained that Carreno "talked down" to the staff and did not help them as she should.

Another server, Bubba, was fired for calling Carreno a vulgar name. He maintained in an email dated May 6, 2007, that her treatment of him provoked his outburst. Audrey, another server, filled out a comment card that said Carreno treated servers disrespectfully. Carreno's personnel file shows two written reprimands, one on May 11, 2007, regarding favoritism and not helping servers, and one on May 18, 2007, for being rude to staff.

On May 25, 2007, Carreno was fired. She filed for unemployment benefits on May 30, 2007. Demos' opposed Carreno's benefits, claiming she was fired for misconduct. On June 22, 2007, the Employment Security Division of the Tennessee Department of Labor and Workforce Development ("Department") determined that she was entitled to benefits. Demos' appealed to the Appeals Tribunal. On July 19, 2007, a hearing began which took place over parts of several months. The Appeals Tribunal issued a decision in favor of Carreno on November 13, 2007, holding that Demos' did not meet its burden of showing misconduct. Demos' appealed again, this time to the Board of Review. On December 18, 2009, the Board of Review affirmed the Appeals Tribunal. Demos' appealed, once again, by filing a petition for review with the chancery court. Demos' maintained that it did meet its burden of proof and that the agency acted arbitrarily. In March 2009, the chancery court affirmed the decision of the administrative bodies. Demos' appealed to this court.

STANDARD OF REVIEW

The standard of review employed by appellate courts in unemployment compensation cases is the same as the one employed by the trial courts. *DePriest v. Puett*, 669 S.W.2d 669, 673 (Tenn. Ct. App. 1984). Unlike other civil appeals governed by Tenn. R. App. P. 13(d), there is no presumption of correctness in these cases. *Wallace v. Sullivan*, 561 S.W.2d 452, 453 (Tenn. 1978). The court may reverse, remand, or modify the administrative decision if it is:

> (A) In violation of constitutional or statutory provisions;
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> (B) In excess of the statutory authority of the agency;
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> (C) Made upon unlawful procedure;
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> (D) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or
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> (E) Unsupported by evidence that is both substantial and material in the light of the entire record.

Tenn. Code Ann. § 50-7-304(i)(2). For purposes of subsection (E), substantial and material evidence is "such relevant evidence as a reasonable mind might accept to support a rational conclusion and such as to furnish a reasonably sound basis for the action under consideration." *Sweet v. State Technical Inst. at Memphis*, 617 S.W.2d 158, 161 (Tenn. Ct. App. 1981) (quoting *Pace v. Garbage Disposal Dist. of Washington County*, 390 S.W.2d 461, 463 (Tenn. Ct. App. 1965)).

ANALYSIS

Demos' maintains that the chancery court, Board of Review, and Appeals Tribunal all erred in failing to find disqualifying misconduct. Yet, the court cannot substitute its judgment for that of the administrative body "as to the weight of the evidence on questions of fact." Tenn. Code Ann. § 50-7-304(i)(3). We review the record to see if the administrative decision is supported by substantial and material evidence.[1]

Demos' claims that the administrative decision is based "solely on Ms. Carreno's testimony that she performed her job to the best of her ability." This claim ignores testimony by Demos' own witnesses. For example, Peter Demos testified:

[1] While adequate for review purposes, we must note that the transcript of the hearing before the Appeals Tribunal is rife with omissions due to the transcriber's inability to determine what was being said.

> Kendra's skills were actually good. She was actually - she opened the floor. She was good in the dining room. She was good at everything else except the way she handled people . . . . Kendra could have pretty much done anything for us.

Similarly, Carreno's supervisor testified:

> We always try to work within the four "F's": firm, fair, friendly and faithful. We teach all of our managers to work within that. Kendra tends to be more on the firm side than she is on the friendly . . . .

Carreno was found by the administrative bodies to be "an extremely credible witness." As to the Phinn Shannon incident, Carreno's supervisor, Linda Lemons, testified that Carreno had the authority to send a server home. Carreno testified that she involved another manager in the decision. Bubba's complaints came after he was fired for calling Carreno a vulgar name. Carreno thought "he was just trying to start up trouble." The third "final straw" complaint was based on a written complaint by a server, Audrey, who did not testify at the hearing.

An unemployment benefits claimant who is discharged due to misconduct connected with the claimant's work is disqualified from receiving benefits. Tenn. Code Ann. § 50-7-303(a)(2)(A). There was no definition of misconduct in the unemployment compensation statutes at the time Carreno was fired.[2] The Tennessee Supreme Court has stated: "[I]n order to establish a disqualification there must be shown a material breach of some duty which the employee owes to the employer." *Cherry v. Suburban Mfg. Co.*, 745 S.W.2d 273, 275 (Tenn.1988). Case law further indicates that "misconduct" includes:

> conduct evincing such wilful and wanton disregard of an employer's interests as is found in deliberate violations or disregard of standards of behavior which the employer has the right to expect of his employee, or in carelessness or negligence of such degree or recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer. On the other hand mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertences or ordinary negligence in isolated instances, or good faith errors in judgment or discretion are not to be deemed "misconduct" within the meaning of the statute.

Armstrong v. Neel, 725 S.W.2d 953, 956 (Tenn. Ct. App. 1986) (citing *Boynton Cab Co. v. Neubeck*, 296 N.W. 636, 640 (Wis. 1941)).

[2] A definition of "misconduct" has been added to the unemployment compensation statutes, effective January 1, 2010, by Chapter 479 of the 2009 Public Acts of Tennessee.

For this court to uphold "the Board of Review's application of the provisions of the statute, we need not find that its construction is the only reasonable one or even that it is the result we would have reached had the question arisen in the first instance in a judicial proceeding." *Sabastian v. Bible*, 649 S.W.2d 593, 594 (Tenn. Ct. App.1983). Our reviewing function is limited: "All that is needed to support the commission's interpretation is that it has warrant in the record and a reasonable basis in law." *Id*. at 594-95 (citing *Cawthron v. Scott*, 400 S.W.2d 240, 242 (Tenn.1966)). After a review of the record, we are of the opinion that there is substantial and material evidence in the record that Carreno's conduct is not the sort of deliberate violation of an employer's standards of behavior that constitutes misconduct within the meaning of the unemployment compensation statutes.

Demos' also contends that the administrative proceedings were arbitrary and capricious for several reasons. First, Demos' states that in the Board of Review's consideration of its appeal, the Board relied on an inaccurate two paragraph summary of the 278 page record.[3] This, Demos' maintains, violated the fair hearing requirement of due process. The record indicates that Demos' filed an "appeal brief" and apparently did not request a hearing. The Board of Review's decision states that there was "a careful review of the record."[4] The Board adopted the findings of fact, conclusions of law and decision of the Appeals Tribunal and affirmed the decision of the Appeals Tribunal. Nothing in the record indicates that Demos' filed a petition to rehear before the Board of Review.[5] If Demos' thought that there was a flaw in the Board's review of the case, a petition to rehear would certainly have been an appropriate and timely way to raise the issue. Nevertheless, Demos' appealed to chancery court,[6] while raising essentially the same issues it raised with the Board of Review. While judicial review of the decision is more limited than that of the Board of Review, Demos' is receiving the due process to which it is entitled.

Second, Demos' suggests that a phone call received from the Department negatively affected its chances to prevail. Felicia Demos testified that she received a call from a Department representative who said that Demos' had submitted too many documents to consider and asked her to send a shorter submission. She complied and Demos' lost the initial determination of misconduct. Demos' argues that "if the Department ha[d] simply reviewed its evidence and given individual consideration to its position in the first instance, prior to making an initial determination, then Demos' would not have been forced to go through this costly appeal process." Demos' position is pure speculation, not a legal argument. Furthermore, when Demos' appealed the Department's

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[3] The summary is not in the appellate record. It is attached to Demos' brief.

[4] The Board of Review has the right to decide the case on the basis of the evidence previously submitted. Tenn. Code Ann. § 50-7-304(e)(1).

[5] The Board of Review's decision indicates that a petition to rehear is permitted.

[6] In the chancery court, Demos sought discovery on the internal process of the Board of Review's decision-making. The chancellor granted a protective order.

initial determination, it received a full hearing, presenting what it submits was "voluminous" evidence in a seven-hour hearing. Demos had its opportunity to be heard.

Demos' also submits that the Appeals Tribunal hearing was "plagued with procedural irregularities." The hearing officer repeatedly interrupted Demos' witnesses with questions. The hearing occurred not in one continuous sitting but in several segments widely separated in time. Two continuances were granted when Carreno did not appear. Carreno was allowed to interrupt and rebut Demos' witnesses on several occasions. These examples do not, individually or collectively, amount to "unlawful procedure" or arbitrary and capricious action within the meaning of Tenn. Code Ann. § 50-7-304(i)(2)(C) or (D).

Finally, Demos' argues that the chancellor should have allowed it to conduct discovery regarding whether the Board of Review members read the transcript or the alleged inaccurate summary before making their decision. This is not the sort of unlawful procedure envisioned by Tenn. Code Ann. § 50-7-304(i)(2)(C). The statute is meant to address a party's ability to challenge the agency's rules and procedures and the failure to follow them, not the decision-making process of the Board of Review. *See Richardson v. Tenn. Bd. of Dentistry*, 913 S.W.2d 446, 457-58 (Tenn. 1995) (discussing Tenn. Code Ann. § 4-5-322(h)(3), which contains language identical to that of Tenn. Code Ann. § 50-7-304(i)(1)(C)). The chancellor was correct in granting a protective order against such discovery.

The chancery court is affirmed. Costs of appeal are assessed against the appellant, Demos', for which execution may issue if necessary.

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ANDY D. BENNETT, JUDGE